(19)

No. 99-1178

Supreme Court, U.S.
FILED
JUL 27 2000
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, JOINED BY THE SOLID WASTE ASSOCIATION OF NORTH AMERICA, AS *AMICI CURIAE* SUPPORTING PETITIONER

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers' migratory bird rule exceeds the scope of the Clean Water Act.

2. Whether the migratory bird rule is a reasonable interpretation of the Clean Water Act entitled to deference.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	7
THE ARMY CORPS OF ENGINEERS' MIGRATORY BIRD RULE EXCEEDS THE SCOPE OF THE CLEAN WATER ACT AND RAISES SERIOUS QUESTIONS REGARDING THE LIMITS OF THE COMMERCE POWER	7
A. The Clean Water Act's Text And Legislative History Demonstrate That The Migratory Bird Rule Is Contrary To Congress' Intent	8
B. The Migratory Bird Rule Is Not Entitled To Deference	21
CONCLUSION	28

TABLE OF AUTHORITIES

Cases — Page

Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986) 4, 14, 15
Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 8, 20, 21
Economy Light and Power Co. v. United States, 256 U.S. 113 (1921) 8
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 486 U.S. 568 (1988) 27
Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993) 25
Jones v. Rath Packing Co., 430 U.S. 519 (1977) 12
Katzenbach v. McClung, 379 U.S. 294 (1964) 18
Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir.), *cert. denied*, 516 U.S. 955 (1995) 5, 15
Missouri v. Holland, 252 U.S. 416 (1920) 26
Motor Vehicle Mfrs. Assn. of United States, Inc., v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 21
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 27
North Dakota v. United States, 460 U.S. 300 (1983) 6, 26, 27, 28
NRDC, Inc., v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) 9, 11
O'Gilvie v. United States, 519 U.S. 79 (1996) 19
Reno v. Bossier Parish School Bd., 520 U.S. 471 (1997) 19

TABLE OF AUTHORITIES—Continued

Page

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 12
Rust v. Sullivan, 500 U.S. 173 (1991) 21
The Daniel Ball, 77 U.S. 557 (1871) 3, 8
United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 8-9
United States v. Lopez, 514 U.S. 549 (1995) 24, 25
United States v. Morrison, 120 S.Ct. 1740 (2000) ..... *passim*
United States v. Price, 361 U.S. 304 (1960) 19
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) ..... *passim*
United States v. Ryan, 284 U.S. 167 (1931) 14
Utah v. United States, 403 U.S. 9 (1971) 17
Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 120 S.Ct. 1858 (2000) 4, 12
Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) 11-12
Wickard v. Filburn, 317 U.S. 111 (1942) 16, 18

Conventions, Statutes & Regulations

33 C.F.R. § 209.260(c) (1974) 9
33 C.F.R. § 328.3 (1999) 9-10
50 C.F.R. § 10.13 (1999) 24
Civil Rights Act of 1964,
§ 201(b), codified at 42 U.S.C. § 2000a(b) 15
§ 201(c), codified at 42 U.S.C. § 2000a(c) 15

TABLE OF AUTHORITIES—Continued

	Page
Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S.—U.S.S.R., 29 U.S.T. 4649, T.I.A.S. No. 9073 (1976)	26
Convention for the Protection of Migratory Birds, U.S.—Great Britain, 39 Stat. 1702 (1916)	26
Convention for the Protection of Migratory Birds and Birds In Danger of Extinction, and Their Environment, U.S.—Japan, 25 U.S.T. 3331, T.I.A.S. No. 7990 (1972)	26
Convention for the Protection of Migratory Birds and Game Mammals, U.S.—Mexico, 50 Stat. 1311 (1936)	26
Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 3901-32	27
Habitat Endowment Act, 520 Ill. Comp. Stat. 25/1-49	28
Migratory Bird Hunting Stamp Act, 16 U.S.C. §§ 718-718j	27
Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712	26
Natural Heritage Fund Act, 30 Ill. Comp. Stat. 150/1-8	28
5 U.S.C. § 553	10
16 U.S.C. § 715d	27
16 U.S.C. § 718(b) & (c)	27
16 U.S.C. § 718d	27
16 U.S.C. § 1302	28
16 U.S.C. § 3901(b)	28
16 U.S.C. § 3922	27
33 U.S.C. § 403	12-13
33 U.S.C. § 407	12

TABLE OF AUTHORITIES—Continued

	Page
33 U.S.C. § 1251(a)	4, 14
33 U.S.C. § 1311(a)	8
33 U.S.C. § 1344(a)	2, 8
33 U.S.C. § 1362(7)	3, 8, 12
Water Bank Act, 16 U.S.C. §§ 1301-1311	27
Wetlands Loan Act of 1961,	
16 U.S.C. § 715k-3	27
16 U.S.C. § 715k-5	27

Other Authorities

118 Cong. Rec. 33,699 (1972)	17-18
118 Cong. Rec. 33,756-57 (1972)	16-17, 17
123 Cong. Rec. 39,209 (1977)	19
39 Fed. Reg. 12,115-19 (1974)	9, 21
40 Fed. Reg. 31,320 (1975)	9
42 Fed. Reg. 37,122 (1977)	9, 21
42 Fed. Reg. 37,128 (1977)	20, 23
42 Fed. Reg. 37,130 (1977)	20
51 Fed. Reg. 41,217 (1986)	3, 10, 22
Memorandum from Francis S. Blake, EPA General Counsel, to Richard E. Sanderson, Acting Assist. Administrator, EPA Office of External Affairs (Sept. 12, 1985)	11, 24
Oversight Hearings On Section 404 Of The Clean Water Act, Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Pub. Works, 99th Cong. (1985)	*passim*
H.R. Rep. No. 92-911 (1972)	16
S. Conf. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776	16

TABLE OF AUTHORITIES—Continued

Page

S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668 ..... 13, 16
S. Rep. No. 95-370 (1977) 19
Margaret N. Strand, Environmental Law Institute, *Wetlands Deskbook* (2d ed. 1997) 11, 24, 28
U.S. EPA and U.S. Dept. of Army, *Guidance for Corps and EPA Field Offices Regarding Clean Water Section 404 Jurisdiction Over Isolated Waters In Light Of United States v. James J. Wilson* <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/wilson.htm> 11

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include municipal, county, and state governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.[2]

Solid waste disposal is one of the most important public services provided by *amici*. Twenty-three Illinois municipalities, with a population of 700,000, formed petitioner Solid Waste Agency of Northern Cook County to find a safe and efficient means of addressing the region's solid waste disposal needs. Towards this end, petitioner undertook a public project of more than $ 20 million, purchasing 533 acres containing a former strip-mine site to serve as a balefill, and after extensive public hearings obtained approvals from local zoning authorities, the county board of commissioners and the Illinois Environmental Protection Agency.

The U.S. Army Corps of Engineers (Corps), however, concluded that 17.6 acres of isolated bodies of water on the site were "waters of the United

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

[2] A substantial majority of the members of *amicus* Solid Waste Association of North America are municipal, county, and regional public officials who are responsible for managing government-owned or government-sponsored solid waste systems.

States" subject to the section 404 permit requirement of the Clean Water Act (CWA). Although the ponds on the site are not hydrologically connected to navigable waters, the Corps denied petitioner's permit application because migratory birds use the site as a habitat. The legal basis for the Corp's permit denial was the migratory bird rule, decreed by EPA and the Corps fourteen years after the enactment of the Clean Water Act.

The language of the Clean Water Act utterly fails to support the migratory bird rule and the Corps' sweeping assertion of jurisdiction over huge areas of the country hitherto subject to state and local environmental and land use regulation. As this case illustrates, the migratory bird rule has the potential to disrupt other important public projects.

Because of the importance of the issues presented to *amici* and their members, *amici* respectfully submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

A. The text and legislative history of the Clean Water Act demonstrate that the migratory bird rule is contrary to Congress' intent. Section 404(a) of the CWA authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into *the navigable waters* at specified disposal sites." 33 U.S.C. § 1344(a) (emphasis added). The Corps' initial regulations did not assert authority to exercise section 404 jurisdiction over isolated intrastate waters based on the presence of migratory birds. Rather, the regulations limited the geographic reach of section 404 to waters deemed navigable under the

traditional navigability test articulated in such cases as *The Daniel Ball*, 77 U.S. 557 (1871).

Not until 1986 did the Corps first take the position—wholly without regard to the navigability of the waters in question—that its section 404 jurisdiction extends to waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird treaties" or "[w]hich are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,217 (1986). This migratory bird rule was adopted in response to two members of the Senate Committee on Public Works and Environment who disagreed with the Corps' prior position that the limited use of a body of water by birds crossing state lines was insufficient to establish jurisdiction under section 404.

Even if Congress has power to regulate isolated intrastate bodies of water with no connection to navigable waters based solely on the presence of migratory birds, neither the CWA's text nor its legislative history support the Corps' conclusion that Congress intended the CWA to effect such a far-reaching and disruptive expansion of federal authority. Land use regulation is a classic exercise of the police powers of States and local governments; the Court has consistently required that Congress' purpose be clear and manifest before it will construe federal law as displacing state authority of this genre.

The CWA defines the term "navigable waters" to "mean[] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). While Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes," *United States v. Riverside*

Bayview Homes, Inc., 474 U.S. 121, 133 (1985), the relevant text is similar to the formulations Congress used in predecessor statutes. To be sure, *Riverside Bayview Homes* stated that the CWA's use of the term "navigable" is "of limited import" in holding that it was "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." *Id.* at 133. But *Riverside Bayview Homes* does not hold that the term "navigable" is of *no* import, which is the essential premise of the migratory bird rule. As *Riverside* makes clear, a non-navigable body of water is subject to the Corps' jurisdiction only if it has a hydrologic connection to a navigable body of water. No such connection has been shown in this case.

The United States contends that the CWA's general purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" supports the Corps' assertion of jurisdiction over isolated, intrastate waters. U.S. Opp. 14 (quoting 33 U.S.C. § 1251(a)). But the CWA's statement of purpose says nothing about Section 404's geographic scope. Moreover, broad statements of statutory purpose do not reflect the "complexity of the problems Congress is called upon to address" and the "hard-fought compromises" of the legislative process. *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Such generalizations are no substitute for an analysis of the statutory text, particularly in a case such as this, in which the Federal Government asserts authority over areas traditionally reserved to the States. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 120 S.Ct. 1858, 1870 (2000).

Finally, the legislative history does not support the Corps' assertion of jurisdiction over isolated intrastate waters based on the presence of migratory birds. The legislative record contains no indication that the CWA was intended to apply to isolated intrastate waters. *See Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394 (9th Cir.), *cert. denied,* 516 U.S. 955 (1995). On the contrary, taken as a whole the legislative history manifests Congress' intent to exercise CWA jurisdiction only over intrastate waters that are themselves used as highways of commerce or have an integral hydrologic connection with navigable waters.

B. Even if Congress' intent regarding the geographic reach of the term "navigable waters" were unclear, deference to the Corps' migratory bird rule is unwarranted. The case for deference is especially weak because the migratory bird rule reflects a 180-degree change in position adopted by the Corps 14 years after the enactment of the CWA. Moreover, the rule was not the subject of notice and comment procedures but rather was adopted in response to pressure from two Senators on the Corps' oversight committee.

In *Riverside Bayview Homes* the Court applied *Chevron* deference in upholding the Corps' "other waters" rule insofar as it asserted section 404 authority over wetlands adjacent to navigable waters. In that instance, however, the Corps' rule was supported by the legislative history and by the sound scientific judgment that pollution of such areas would directly affect water quality of adjacent navigable waters. *See* 474 U.S. at 133-35. No similar scientific judgment supports the migratory bird rule's assertion of jurisdiction over isolated intrastate waters without

regard to a water body's past, present, or future navigability.

A further reason for rejecting the migratory bird rule is that it raises a grave constitutional question regarding the scope of Congress' power to regulate interstate commerce. The migratory bird rule rests, as the court of appeals recognized, on the view that Congress can regulate any intrastate activity without regard to whether it is commercial in nature, provided some link to interstate commerce can be hypothesized. *See* Pet. App. 6a-7a. The Court has repeatedly rejected this line of reasoning, most recently in *United States v. Morrison*, 120 S.Ct. 1740, 1750 (2000): "[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." The migratory bird rule, however, contains no requirement that the discharge of fill material into intrastate waters be undertaken for commercial purposes.

That there is a "'national interest of very nearly the first magnitude' in protecting [migratory] birds," Pet. App. 8a (quoting *North Dakota v. United States*, 460 U.S. 300, 309 (1983)), does not make the migratory bird rule a reasonable construction of the CWA. Congress has enacted a variety of wetlands preservation statutes that seek to protect migratory bird habitats through such measures as the outright acquisition of wetlands, easements, and conservation agreements with landowners. Congress' current use of these non-regulatory methods to protect wetlands and migratory bird habitats reinforces the conclusion that the migratory bird rule is not a reasonable

construction of the Clean Water Act. The Corps' rule is therefore not entitled to deference.

ARGUMENT

THE ARMY CORPS OF ENGINEERS' MIGRATORY BIRD RULE EXCEEDS THE SCOPE OF THE CLEAN WATER ACT AND RAISES SERIOUS QUESTIONS REGARDING THE LIMITS OF THE COMMERCE POWER

The court of appeals erroneously held that the Clean Water Act grants the Corps of Engineers authority to assert section 404 jurisdiction over the ponds located on SWANCC's site on the basis of the migratory bird rule.[3] This rule, decreed by EPA and the Corps fourteen years after the CWA's enactment, asserts jurisdiction over isolated intrastate waters based solely on the fact that migratory birds use the waters as a habitat. It was applied notwithstanding that the ponds on SWANCC's site are intrastate waters with no hydrologic connection to the navigable waters of the United States.

The Corps' application of the migratory bird rule to the SWANCC site renders the CWA's text meaningless. It likewise finds no support in the CWA's legislative history. Whatever the precise boundary Congress contemplated when it defined the term "navigable waters" in the CWA, it most assuredly does not mean waters that have no

---

[3] The SWANCC site contains "over 200 permanent and seasonal ponds" that "were once gravel pits." Pet. App. 2a. "These ponds range from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." *Id.*

connection to navigable waters. The migratory bird rule, however, is based on the premise that the concept of navigability is totally irrelevant in defining the waters subject to the CWA. And the rule further rests on a view of Congress' Commerce Clause powers which stretches them beyond constitutional limits. *See, e.g., United States v. Morrison,* 120 S.Ct. 1740, 1750 (2000). For these reasons, the migratory bird rule is invalid and the court of appeals' invocation of *Chevron* deference is misplaced. *See* Pet. App. 9a-10a (citing *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)).

A. The Clean Water Act's Text And Legislative History Demonstrate That The Migratory Bird Rule Is Contrary to Congress' Intent

1. Section 404(a) of the CWA authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The CWA thus prohibits "the discharge of any pollutant" into the navigable waters "[e]xcept as in compliance with" the Act. *Id.* § 1311(a). The Act states that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The Corps' initial regulations did not assert authority to exercise section 404 authority over isolated intrastate waters based on the presence of migratory birds. Rather, the regulations limited the geographic reach of section 404 to waters deemed navigable under the traditional navigability test articulated in such decisions as *The Daniel Ball,* 77 U.S. 557 (1871); *Economy Light and Power Co. v. United States,* 256 U.S. 113 (1921); and *United States*

v. Appalachian Electric Power Co., 311 U.S. 377 (1940). *See* 33 C.F.R. § 209.260(c) (1974); 39 Fed. Reg. 12,115-19 (1974).

In *NRDC, Inc., v. Callaway,* 392 F. Supp. 685, 686 (D.D.C. 1975), the district court held, however, that the Corps' officials had "acted unlawfully and in derogation of their responsibilities under Section 404" because the regulations did not assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause." The court gave no explanation as to how it came to the conclusion that Congress intended to exercise its commerce clause powers to their fullest extent. Based on this conclusion, the court ordered the Corps to promulgate "regulations clearly recognizing the full regulatory mandate of the" CWA. *Id.*

The Corps thereafter adopted the "other waters rule." *See* 42 Fed. Reg. 37,122 (1977); 40 Fed. Reg. 31,320 (1975). The current version of this rule – in effect since 1982—expands the term "waters of the United States" to encompass, *inter alia*:

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce[.]

33 C.F.R. § 328.3 (1999). The rule thus made, and continues to make, no reference to migratory birds. Rather, the rule limited the Corps' authority to those intrastate waters which were themselves used, or capable of being used, in commercial activity. Thus, even after *Callaway,* the Corps did not assert section 404 authority over intrastate waters based merely on the presence of migratory birds.

It was not until 1986 that the Corps stated, in a preamble to its regulatory programs' final rule, that "EPA has clarified" that the "other waters rule" also included waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties" or "[w]hich are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,217 (1986). The "migratory bird rule" was thus never subjected to the scrutiny of notice and comment procedures, *see* 5 U.S.C. § 553, notwithstanding that it broadly expanded section 404 jurisdiction and marked a substantial departure from prior regulatory policy.

Rather, the rule was adopted in response to the criticism of two members of the Senate Committee on Public Works and Environment who took issue with the Corps' view that "[t]he limited use of a water by a migratory species in interstate traveling [is] insufficient to establish jurisdiction." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works,* 99th Cong., at 114 (1985) (*Hearings*) (statement of Sen. Mitchell). *See also id.* at 121

(Sen. Chafee). *See* U.S. EPA and U.S. Dept. of Army, *Guidance for Corps and EPA Field Offices Regarding Clean Water Section 404 Jurisdiction Over Isolated Waters In Light of United States v. James J. Wilson* 4 <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/wilson.htm>; Memorandum, from Francis S. Blake, EPA General Counsel, to Richard E. Sanderson, Acting Assist. Administrator, EPA Office of External Affairs 1 (Sept. 12, 1985), *reprinted in* Margaret N. Strand, Environmental Law Institute, *Wetlands Deskbook* 692 (2d ed. 1997). In the views of these two Senators, Congress, in enacting the CWA, asserted jurisdiction "'to the maximum extent permissible under the commerce clause of the Constitution.'" *Hearings*, at 113 (statement of Sen. Mitchell) (quoting *Callaway,* 392 F.Supp. at 686); *id.* at 121-23. *See also id.* at 170 (statement of Sen. Mitchell) (asserting actual evidence of use by migratory birds not required to establish CWA jurisdiction); *id.* at 193-94 (statement of Sen. Chafee).

2. Even if Congress has power under the commerce clause to regulate isolated intrastate bodies of water with no connection to navigable waters based solely on the presence of migratory birds, neither the CWA's text nor its legislative history support the conclusion that Congress intended such a far-reaching and disruptive expansion of federal authority. The district court's view in *Callaway* that Congress, in enacting the CWA, "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause," 392 F. Supp. at 686, ignores that such a sweeping assertion of federal power seriously intrudes on the traditional authority of state and local governments in regulating land use. *See, e.g., Village of Euclid,*

Ohio v. Ambler Realty Co., 272 U.S. 365 (1926). The Court, however, has generally required that Congress' purpose be "clear and manifest" before construing federal law as displacing traditional state authority. *See, e.g., Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 120 S.Ct. 1858, 1870 (2000); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Neither the statutory text, committee reports, nor floor statements by the Act's leading proponents provide evidence demonstrating that Congress intended to regulate isolated intrastate waters with no hydrologic connection to navigable waters.

That Congress defined the term "navigable waters" to "mean[] the waters of the United States, including the territorial sea," 33 U.S.C. § 1362(7), does not establish that Congress intended to assert federal jurisdiction to the limit of the commerce power. While Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes," *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985), the relevant text is similar to the formulations Congress used in the predecessor statute, the Refuse Act of 1899. *See* 33 U.S.C. § 407 ("[i]t shall not be lawful to . . . discharge . . . any refuse matter of any kind . . . into any navigable water of the United States, or into any tributary of any navigable water"). Contemporaneous with the Refuse Act, the Rivers and Harbors Appropriation Act of 1899 made it illegal to excavate or fill various navigable waters without Corps approval. *See* 33 U.S.C. § 403 (Rivers and Harbors Appropriation Act of 1899) (listing various waters) ("it shall not be lawful to excavate or fill, or in any manner to alter or

modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States"). All of these are, of course, indisputably "waters of the United States." Defining "navigable waters" as "waters of the United States" is thus plausibly viewed as a form of legislative shorthand for prior statutory formulations.

The Court has, of course, viewed the CWA's definition more broadly, stating that "the Act's definition . . . makes it clear that the term 'navigable' as used in the Act is of limited import." *Riverside Bayview Homes, Inc.*, 474 U.S. at 133. But *Riverside Bayview Homes* does not hold that the term "navigable" is of *no* import, which is the essential premise of the migratory bird rule. The Court's recognition that "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 133 (emphasis added), is not an endorsement of the Corps' assertion of jurisdiction over intrastate waters merely because migratory birds could use them for a habitat. Rather, Congress used a broader definition to include adjacent waters, which are not navigable, because "'[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 133 (quoting S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).

As that passage makes clear, a non-navigable body of water is subject to the Corps' jurisdiction if it has a

hydrologic connection to a navigable body of water. That is fairly within the CWA because pollution of such waters will ultimately affect the water quality of navigable waters. But where a body of water has never been used in navigation and never will be, it must have a hydrologic connection to navigable waters for the Corps to assert jurisdiction. That connection is plainly lacking here. *See* Pet. App. 2a. In short, the migratory bird rule requires defining the term "navigable waters" to delete all reference to the concept of navigability, or even to a hydrologic connection to navigable waters. Such a definition, however, robs the statutory text of sensible meaning and should be rejected. *See United States v. Ryan,* 284 U.S. 167, 175 (1931).

The United States nonetheless contends that the CWA's general purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" supports the Corps' assertion of jurisdiction over isolated waters. U.S. Opp. 14 (quoting 33 U.S.C. § 1251(a)). But the CWA's purpose says nothing about the geographic scope of the statute. Taken to its logical conclusion, Section 1251 would justify defining "waters of the United States" to include every body of water in the country including skating and fishponds, to prevent the alteration of their "chemical, physical and biological integrity."

As the Court has often recognized, broad statements of statutory purpose do not reflect the "complexity of the problems Congress is called upon to address" and the "hard-fought compromises" of the legislative process. *Board of Governors v. Dimension Fin. Corp.,* 474 U.S. 361, 373-74 (1986). Such statements provide little aid in construing specific

textual provisions, which remain the best indicia of Congressional intent. *See id.* at 373. This rule of construction applies with particular force, where, as here, the Federal Government asserts authority over areas traditionally reserved to the States.

Indeed, if Congress had intended to apply the CWA to isolated intrastate waters based on the "affecting commerce" rationale, it would have clearly expressed this intent, as it did in other statutes. *See* Civil Rights Act of 1964, § 201(b) & (c), codified at 42 U.S.C. § 2000a(b) (defining various intrastate businesses as "place of public accommodation . . . if its operations affect commerce"); *id.* § 2000a(c) (defining "operations of an establishment affect[ing] commerce"). The absence of similar language in the CWA demonstrates that Congress did not intend the far-reaching assertion of federal authority embodied in the Corps' migratory bird rule.[4]

3. The legislative history likewise does not support the assertion of federal jurisdiction over isolated intrastate waters based on the presence of migratory birds. The voluminous materials comprising the legislative record do not contain a single mention that the Act was intended to apply to isolated intrastate waters. *See Leslie Salt Co. v. United States,* 55 F.3d 1388, 1394 (9th Cir.), *cert. denied,* 516 U.S. 955 (1995). And the various discussions of the term "navigable waters" do not remotely sanction the expansive assertion of jurisdiction adopted by the Corps. The Senate Report, which *Riverside Bayview Homes* quoted with approval, explains:

---

[4] Congress might also have included the requisite jurisdictional element in the CWA, *see Morrison,* 120 S.Ct. at 1751, which it likewise declined to do.

> The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirement must be made to the navigable waters, portions thereof, and their tributaries.

Sen. No. 92-414, at 77, *reprinted in* 1972 U.S.C.C.A.N. at 3742-43.

To be sure, the Conference report states that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." Sen. Conf. Rep. No. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822; *see also* H.R. Rep. No. 92-911, at 131 (1972). That is not the same, however, as asserting the exercise of commerce clause powers over intrastate activities in the manner of *Wickard v. Filburn,* 317 U.S. 111 (1942). Rather, it is merely a rejection of "the old, narrow definitions of navigability, as determined by the Corps of Engineers," and the assertion of jurisdiction over waters based on the then "more recent judicial opinions which have substantially expanded [the] limited view of navigability—derived from the Daniel Ball case—to include waterways which would be 'susceptible of being used . . . with reasonable improvement,' as well as those waterways which include sections presently

obstructed by falls, rapids, sand bars, currents, floating debris, et cetera." 118 Cong. Rec. 33,756-57 (1972) (statement of Rep. Dingell) (citations omitted).

Nor is the Corps' broad interpretation of the term "navigable waters" supported by the Court's holding, one year prior to the enactment of the CWA, that the Great Salt Lake, a wholly intrastate lake, was navigable water for purposes of the equal footing doctrine. *See Utah v. United States,* 403 U.S. 9, 11 (1971). This decision explained that "the gist of the federal test" was that the lake had earlier "served as a highway" of commerce "and it is that feature that distinguishes between navigability and non-navigability." *Id.* Indeed, on the floor, Representative Dingell made express reference to the *Utah* test in explaining that "[t]he 'gist of the Federal test' is the waterway's use 'as a highway,' not whether it is 'part of a navigable interstate or international commercial highway.'" 118 Cong. Rec. at 33,757 (quoting 403 U.S. at 11). Thus, while intrastate waters can be "navigable," the CWA clearly contemplates that the waters be used as a highway of commerce.

Consistent with this understanding, Senator Muskie, who led the effort to enact the CWA in the Senate, remarked:

> It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a

> continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

118 Cong. Rec. at 33,699.

These statements refute the suggestion that Congress intended for the CWA to apply to isolated intrastate waters based on the presence of migratory birds. Taken as a whole, the legislative history manifests Congress' intent to exercise CWA jurisdiction over those intrastate waters which were themselves used as "highways" of commerce. Indeed, notwithstanding that prior to the CWA's enactment the Court had upheld Congressional regulation of intrastate activity which had a substantial effect on interstate commerce, *see, e.g., Katzenbach v. McClung,* 379 U.S. 294, 302 (1964); *Wickard v. Filburn,* 317 U.S. 111, 125 (1942), the legislative history contains no assertion of the need to regulate isolated intrastate waters to protect the interstate market in fish or tourism. The absence of any such comments in the committee reports or floor statements manifests that Congress intended that the CWA's geographic limit would be largely determined in accordance with the judicial definition of navigability and not on a water body's use or potential use in commercial activities.

The United States, however, points to the legislative history of the 1977 amendments to argue that Congress acquiesced in the Corps' expansion of its jurisdiction. *See* U.S. Opp. 16-17. According to the United States, "Congress was well aware that the

Corps' regulations, promulgated July 19, 1977, asserted jurisdiction over all waters, including isolated waters, to the maximum extent constitutionally permissible." *Id.* at 16. Because in 1977 "Congress considered, but ultimately rejected, several proposals to modify the Corps' geographic jurisdiction," the Corps' "other waters rule" should be deemed consistent with the intent of the 1972 Congress. *Id.* The United States thus contends that "the 1977 amendments 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the [CWA] to control pollution to the fullest constitutional extent.'" *Id.* at 16 (quoting 123 Cong. Rec. at 39,209 (1977) (Statement of Sen. Baker)); *see also* S. Rep. No. 370, at 75 (same).

This argument fails for several reasons. First, the view expressed in Senate Report No. 370 and by Senator Baker provides no basis for inferring the intent of the earlier enacting Congress. *See, e.g., Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 484-85 (1997) (quoting *United States v. Price,* 361 U.S. 304, 313 (1960) ("'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'")); *O'Gilvie v. United States,* 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the interpretation of an earlier enacted statute").

Second, the contention that the 1977 Congress' failure to overturn the Corps' new and broader assertion of jurisdiction amounts to acquiescence is misplaced. Initially, the Corps did not interpret the "other waters rule" to assert jurisdiction over isolated intrastate waters on the basis that migratory birds used them as a habitat. While the rule did go beyond the clear intent of the 1972 Congress, it plainly

required that a body of water must itself be used for commercial activity to be subject to section 404. Moreover, the Corps simultaneously issued a nationwide permit allowing "discharges of dredged or fill material into natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are either fed or drained by a river or stream above the headwaters, or isolated and not part of a tributary system to navigable waters of the United States or interstate waters." 42 Fed. Reg. 37,130 (1977). It is no surprise that Congress did not overturn the new rule, for while the Corps, in the "other waters rule," asserted broader geographic jurisdiction, the same rulemaking essentially disclaimed it over "most of these waters." *Id.* at 37,128.

Finally, for nine years following the promulgation of the "other waters rule," the Corps took the view that "[t]he limited use of a water by a migratory species in interstate traveling [is] insufficient to establish jurisdiction." *Hearings,* at 114 (statement of Sen. Mitchell). Thus, whatever the actions of the 1977 Congress indicate about the intent to expand the jurisdictional reach of the CWA to protect adjacent wetlands, *see Riverside Bayview Homes,* 474 U.S. at 136-139, they say nothing about the propriety of applying the other waters rule to isolated intrastate waters.

As the foregoing demonstrates, the text and legislative history establish that the migratory bird rule is "manifestly contrary to the statute." *Chevron,* 467 U.S. at 844. As *Chevron* dictates, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The court of appeals thus

erred when it proceeded to the second step of the *Chevron* inquiry and deferred to the Corps' migratory bird rule as a reasonable interpretation of the CWA. *See* Pet. App. 10a.

B. The Migratory Bird Rule Is Not Entitled To Deference

Even if the Court were to find Congress' intent unclear with respect to the geographic reach of the term "navigable waters," deference to the Corps' migratory bird rule is unwarranted. While deference to an agency's interpretation of a statute it is charged with administering is appropriate when that interpretation is "reasonable," *see Chevron,* 467 U.S. at 843-45, several factors demonstrate that the Corps' rule is not a "reasonable" reading of the CWA.

1. The case for deference is especially weak because the migratory bird rule is not a contemporaneous construction of the statute. While "'[a]n initial agency interpretation is not instantly carved in stone' and 'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis,'" *Rust v. Sullivan,* 500 U.S. 173, 186 (1991) (quoting *Chevron,* 467 U.S. at 863-64), the Corps' change in position is neither the result of any "reasoned analysis" nor informed rulemaking. *Id.* at 187 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983)). The Corps did not adopt the migratory bird rule in either its initial rulemaking, *see* 39 Fed. Reg. 12,115-19 (1974), or the subsequent rulemaking which promulgated the "other waters rule." *See* 42 Fed. Reg. 37,122 (1977). Indeed, the Corps initially took the view—in the words of Senator Mitchell—that "[t]he limited use of a water by a migratory

species in interstate traveling" is "insufficient to establish jurisdiction." *Hearings*, at 114. The rule's adoption was thus a 180-degree change in position, which occurred fourteen years after the CWA's enactment.

The Corps' "about face" might be unobjectionable if it had engaged in "informed rulemaking." But the migratory bird rule was not subject to notice and comment procedures. *See* 51 Fed. Reg. at 41,217 (1986). Rather, in response to the unrelenting pressure of two Senators on its oversight committee, the rule was simply decreed as a fait accompli. *See id.* ("EPA has clarified that waters of the United States . . . also include . . . waters . . .[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or . . . [w]hich are or would be used as habitat by other migratory birds which cross state lines[.]"). Neither EPA nor the Corps had any interest in the views of the public or of state and local governments. While the court below reasoned that the migratory bird rule is only an interpretive rule and thus was not subject to the APA's notice and comment procedures, *see* Pet. App. 11a, these circumstances provide further reason why *Chevron* deference is inappropriate.

It is true that the Court in *Riverside Bayview Homes* applied *Chevron* deference in upholding the Corps' "other waters rule" insofar as it asserted section 404 authority over wetlands adjacent to navigable waters. *See* 474 U.S. at 131-35. In this respect, however, the Corps rule found substantial support in the legislative history and ultimately rested on the sound scientific judgment that pollution of such areas would directly affect water quality of adjacent navigable waters. *See id.* at 133-35. As the

Corps, in a passage of the "other waters" rulemaking explained,

> Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.
>
> For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.

42 Fed. Reg. 37,128 (1977) (quoted in *Riverside Bayview Homes*, 474 U.S. at 134). As the Court put it, "the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment . . . . [W]e cannot say that the Corps' judgment on these matters is unreasonable." 474 U.S. at 135.

No similar scientific judgment supports the Corps' assertion of jurisdiction over isolated intrastate waters. On the contrary, the sole justification for that assertion of federal power is the erroneous assumption that Congress exercised its commerce clause powers to their fullest extent.

The Corps' assertion of jurisdiction over isolated intrastate waters on the basis of the migratory bird rule is even more problematic. Most significantly, migratory birds' use of a body of water as a habitat has no connection with that body's past, present, or future navigability. Moreover, the presence of migratory birds does not in any way identify those water

bodies, the pollution of which would affect the water quality of navigable waters. Indeed, with several hundred species comprising the Fish and Wildlife Service's migratory bird list, *see* 50 C.F.R. § 10.13, and their population estimated to be as high as several billion, *see* Pet. App. 7a, rare is the body of water which is not a potential habitat.[5] The Corps' rule thus reads the CWA's geographic limitation to navigable waters out of the statute. It is not a reasonable or permissible reading of the statute and is therefore not entitled to deference.

2. The Court should also reject the Corps' migratory bird rule because it raises a grave constitutional question regarding the scope of Congress' commerce clause powers. The migratory bird rule rests on the view that Congress can regulate any intrastate activity without regard to whether it is commercial in nature as long as some hypothesis can be asserted to link the activity to interstate commerce. *See* Pet. App. 6a-7a. The Court, however, has now repeatedly rejected this line of reasoning, which transmutes the commerce clause into a general police power. *See United States v. Morrison*, 120 S.Ct. 1740, 1751-54 (2000); *United States v. Lopez*, 514 U.S. 549, 564-67 (1995).

The court of appeals recognized that the migratory bird rule is not a "regulation of the channels of

[5] The Corps' assertion of jurisdiction is not limited to those water bodies that are in "actual use" by migratory birds. *See* Blake Memorandum at 3, *reprinted in Wetlands Deskbook* at 694. "[I]f a particular waterbody shares the characteristics of other waters whose use by and value to migratory birds is well established and those characteristics make it likely that the waterbody in question will also be used by migratory birds," it is subject to the Corps' jurisdiction. *Id.*

interstate commerce" or a "regulation or protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce." Pet. App. 5a-6a. Invoking *Wickard*, the court of appeals reasoned, however, that the migratory bird rule was a constitutionally valid "regulation of activities that 'substantially affect' interstate commerce." *Id.* at 5a (quoting *Lopez*, 514 U.S. at 559). The gist of the court's rationale was that "'the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds.'" *Id.* at 7a (quoting *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993)). Because people travel across state lines to view and hunt migratory birds and spend money in pursuit of these activities, the court concluded that "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce." *Id.*

The Court's recent decision in *Morrison*, however, squarely rejects the notion that the *Wickard* rationale supports regulation of non-commercial intrastate activities. As the Court explained: "*Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 120 S.Ct. at 1750 (citing *Lopez*, 514 U.S. at 559-60). Section 404 and the migratory bird rule assert regulatory authority over those who seek to fill in "waters," without regard to whether they are doing so for commercial purposes. While the Court has not "adopt[ed] a categorical rule against aggregating the effects of any

noneconomic activity in order to decide [Commerce Clause] cases," it has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 1751. Because the migratory bird rule contains no requirement that a discharge of fill material into intrastate waters be undertaken for commercial purposes, the rule cannot be upheld without the Court sanctioning a dramatic expansion of Congress' constitutional authority. *See id.* at 1750-51 (commerce-based jurisdictional element "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce").

The seriousness of this question is not diminished by the "'national interest of very nearly the first magnitude' in protecting such birds." Pet. App. 8a (quoting *North Dakota v. United States,* 460 U.S. 300, 309 (1983)). None of the migratory bird conventions which the United States has entered into requires that the contracting parties prohibit the filling of wetlands used as a habitat by migratory birds. *See* Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., 29 U.S.T. 4649, T.I.A.S. No. 9073 (1976); Convention for the Protection of Migratory Birds and Birds In Danger Of Extinction, and Their Environment, U.S.—Japan, 25 U.S.T. 3331, T.I.A.S. No. 7990 (1972); Convention for the Protection of Migratory Birds and Game Mammals, U.S.- Mexico, 50 Stat. 1311 (1936); Convention for the Protection of Migratory Birds, U.S.—Great Britain, 39 Stat. 1702 (1916). Moreover, the Migratory Bird Treaty Act, which implements these conventions, contains no such prohibition. *See* 16 U.S.C. §§ 703-712. Thus, in contrast to *Missouri v. Holland,* 252 U.S. 416 (1920), which involved execution of a treaty obligation, the

issue here is fundamentally one regarding the scope of the commerce power. And contrary to the suggestion of the court of appeals, this Court has never held that "the regulation of migratory bird habitat is a permissible exercise of Congress' authority" under the Commerce Clause. Pet. App. 9a. Because the Corps' construction "raise[s] serious constitutional problems," it is not entitled to deference. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 486 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 507 (1979).

3. That "Congress has repeatedly recognized the importance of preserving migratory bird habitat to the viability of migratory bird populations," U.S. Opp. 19 n.11, does not render the migratory bird rule a reasonable construction of the CWA. The approach Congress has thus far taken in various wetlands preservation statutes demonstrates that the migratory bird rule is plainly inconsistent with current Congressional policy. Statutes such as the Migratory Bird Hunting Stamp Act, 16 U.S.C. §§ 718-718j; the Wetlands Loan Act of 1961, 16 U.S.C. §§ 715k-3, -5; the Water Bank Act, 16 U.S.C. §§ 1301-1311; and the Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 3901-3932, have rejected the regulatory approach of the migratory bird rule. Instead, these statutes have sought to protect migratory bird habitats through such measures as the outright acquisition of wetlands, *see* 16 U.S.C. § 3922; 16 U.S.C. §§ 715d; 718(b) & (c); 718d, purchasing "easements prohibiting fee owners from draining their wetlands or otherwise destroying the wetlands' suitability as breeding grounds," including by "filling," *North Dakota v. United States,* 460 U.S. 300, 303, 305 n.6 (1983), and entering into

"conservation agreements" with landowners in exchange for monetary payments. 16 U.S.C. § 1302. As *North Dakota v. United States* indicates, these statutes have frequently been used to acquire, either in fee or through easement, large areas of habitat such as prairie potholes that are isolated from navigable waters. *See* 460 U.S. at 304 n.4; *see generally Wetlands Desk Book*, at 77-81.[6] Congress' repeated election to protect isolated intrastate wetlands through "acquisition" and "cooperative efforts among private interests and local, State and Federal governments," 16 U.S.C. § 3901(b), highlights the unreasonableness of the migratory bird rule as an interpretation of the Clean Water Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the
Amici Curiae

July 27, 2000

[6] Illinois has enacted both the Habitat Endowment Act, 520 Ill. Comp. Stat. 25/1—49, and the Natural Heritage Fund Act, 30 Ill. Comp. Stat. 150/1—8, to acquire habitat including wetlands. Illinois and the other States, of course, retain their general police power to protect wetlands and migratory bird habitats by means other than acquisition.